

NTSB Order No. EA-4180

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 1994

Docket SE-12580

of the Federal Aviation Regulations (FAR), 14 CFR Part 91,² as a result of an altitude deviation which occurred while respondent was operating, as pilot-in-command, Delta Airlines Flight 1852, on September 12, 1990. The 30-day suspension of respondent's ATP certificate was waived under the provisions of the Aviation Safety Reporting Program (ASRP).

Respondent raises three issues on appeal.³ He contends that the evidence is insufficient to support the findings of FAR violations, and he argues that in any event, his conduct should be excused because he relied on his first officer for confirmation of the clearance issued by ATC. Finally, respondent asserts that the law judge's intervention regarding the examination of witnesses deprived him of a fair trial. For the reasons that follow, we will deny the appeal and affirm the law judge's initial decision.

²FAR §§ 91.123(a) and 91.13(a) provide as follows:

§ 91.123 Compliance with ATC [air traffic control] clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained....If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator has filed a reply brief in which he urges the Board to affirm the initial decision.

The only factual issue in this case is whether, on the day and time in question, the crew of Delta Airlines Flight 1852 acknowledged a clearance to FL 270 in their readback of ATC's clearance, or whether they read back FL 370. Respondent was the flying pilot and his first officer was handling ATC radio communications. Respondent, who admits that he was monitoring ATC communications, claims that he heard ATC issue a clearance to FL 370. Respondent dialed FL 370 into the mode control panel of the autopilot. He testified that his first officer then read back the clearance to ATC as FL 370 and pointed to the panel, confirming the clearance which respondent had entered into the mode control panel.⁴ Air traffic control observed the aircraft climbing above its clearance and instructed Delta 1852 to maintain flight level 280 in order to avoid a further loss of separation with a United aircraft which was at FL 290. When ATC subsequently advised Delta 1852 that they had been cleared only to FL 270, the first officer replied that he believed they had been cleared to FL 370.

⁴Respondent contends that he should be exculpated of responsibility for the misunderstanding because he relied on his first officer's nonverbal confirmation of the clearance. We disagree. Respondent admitted that he was also monitoring the ATC communications. Thus, based on the law judge's credibility findings in favor of the Administrator's witnesses, the reliance defense set forth in Administrator v. Coleman, 2 NTSB 229 (1968) is unavailable to him, and, furthermore, he had the ability and opportunity to personally ascertain the correct clearance. Administrator v. Buboltz, NTSB Order No. EA-3907 at 5, recon. denied, NTSB Order No. EA-3981 (1993). See also Administrator v. Chaille, NTSB Order No. EA-3643 (1992) (Coleman defense available only where the ATC communication is not heard or understood by flying pilot, who then seeks and reasonably relies on confirmation from pilot handling radio communications).

Respondent's entire defense is dependent on his assertion that his first officer read back FL 370, and that ATC should have caught the mistake. Recent Board precedent would support this argument, see, e.g., Administrator v. Swafford and Coleman, NTSB Order No. EA-4117 (1994), but for the fact that respondent's claim that his first officer read back FL 370 is not supported by the record. Three air traffic controllers testified⁵ that the clearance was issued for FL 270 and that the readback they heard was to FL 270.⁶ Moreover, the recording of ATC communications with Delta 1852 supports the controllers' testimony. We agree with the law judge that the tape recording establishes that both the clearance and the readback were for FL 270, and that the communications were sufficiently clear so as to not require ATC

⁵We agree with respondent that it was unusual for the law judge to ask that the Administrator re-open his case to take the testimony of the controller who was training the controller who issued the clearance. However, the law judge's request was clearly based on his desire to have as complete a record as possible, since he apparently knew that the witness was available outside the courtroom, and in our view there is no evidence of bias on his part in favor of the Administrator. In any event, since the testimony merely corroborated the Administrator's other evidence, which was more than substantial, any error was harmless.

⁶The third controller was called as respondent's witness. This controller was working the data sector at the time of the altitude deviation. Respondent's attempt to impeach this controller with his testimony during a pre-trial deposition was unpersuasive to the law judge and is unpersuasive to the Board. As the witness explained, and as is readily apparent to us, he testified in his deposition and at the hearing that the readback he heard in acknowledgment to the clearance was for FL 270. When he states that he heard Delta 1852 read back FL 370, he was referring to the crew's reply to ATC's altitude deviation alert, where they told ATC that they thought they had received a clearance to FL 370.

to question respondent's understanding of the clearance issued. Even respondent's own expert witness admits that when he listened to the tapes in open court, on the FAA's tape recorder, he heard the clearance and the readback as FL 270. See, e.g., TR-117. Respondent's assertion that he may have heard something other than what is on the tape because of peculiarities within the cockpit environment is merely speculative and clearly insufficient to rebut the actual evidence introduced by the Administrator. We adopt the law judge's findings as our own.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's order and the initial decision are affirmed.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.